IN THE

Supreme Court of the United States

October Term, 1970

No. 124

WILLIE S. GRIGGS, *et al.*, *Petitioners*,

v.

DUKE POWER COMPANY, a Corporation, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF UNITED STEELWORKERS OF AMERICA, AFL-CIO FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO, AMICUS CURIAE

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United Steelworkers of America, AFL-CIO (hereinafter "USWA"), moves for leave to file the attached brief *amicus curiae* in support of the petitioners. The consent of petitioners was obtained, but consent was refused by respondent.

USWA is a labor organization representing approximately 1,250,000 employees in the steel, aluminum, nonferrous and metal fabricating industries. While USWA does not maintain statistics on the race or nationality of its members, it is believed that approximately a quarter of a million of USWA's members are Negroes, and that a substantial segment of USWA's membership consists of members of other minority groups. One of USWA's Constitutional objectives is "to protect and extend . . . civil rights and liberties". In pursuit of that objective, USWA actively campaigned for passage of the Civil Rights Act of 1964, especially Title VII's prohibition of employment discrimination.

The issue presented in the instant case is whether an employer violates Title VII by utilizing non-job-related tests and standards as criteria for determining employees' eligibil-

ity to advance or transfer within the plant. The court below held that such tests and standards are not violative of Title VII, absent evidence of an actual intent to discriminate. USWA believes that this holding is dangerously wrong and should be reversed by this Court.

USWA has been fighting for decades to eliminate through collective bargaining the use of non-job-related tests and standards as criteria for job advancement, because such devices are irrelevant to the employer's need for determining competence to perform the particular jobs sought by his employees, are unfairly weighted against those who have received inadequate or inferior educations, and are culturally biased.

USWA's quest at the bargaining table has met with mixed success. The current agreements between USWA and most of the major steel producers provide that all tests "shall be free of cultural, racial or ethnic bias".[1] They further provide that (with two exceptions discussed below):

> "[W]here tests are used by the Company as an aid in making determinations of the qualifications of an employee, such a test . . . must in any event be a job-related test. A job-related test, either written or in the form of an actual work demonstration, is one which measures whether an employee can satisfactorily meet the specific requirements of that job including the ability to absorb any training which may necessarily be provided for that job."[2]

The two exceptions relate to entrance into the apprenticeship programs (which train employees for certain particular types of trade and craft jobs which exist in the steel indus-

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[1] Agreement between United States Steel Corporation and the United Steelworkers of America, dated August 1, 1968, Appendix F, Paragraph 5(b). Identical language appears in USWA's agreements with most of the other major steel producers.

[2] *Id.*, Appendix F, Paragraph 1.

try) and the filling of these trade and craft vacancies.[3] USWA has been unable in collective bargaining to win express assurance that in filling such apprenticeship and trade and craft vacancies the employers will utilize only tests which are job-related.

USWA's goal is to eradicate, either in collective bargaining or through litigation, non-job-related testing and standards wherever they continue to be utilized by employers whose employees it represents (apprenticeship and trade and craft vacancies in the basic steel plants, and the broader use of such tests and standards by many smaller producers who have not agreed to the basic steel provision quoted above). The decision below, holding that the utilization of non-job-related tests and standards does not violate Title VII, is a major threat to the fulfillment of USWA's goal. Accordingly, USWA is vitally interested in the outcome of this litigation, and begs leave to file the attached brief *amicus curiae*.

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[3] *Id.*, Appendix F, Paragraphs 3 and 4.

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This case poses an issue which, perhaps more than any other, will determine whether Title VII can succeed in according minority employees equal opportunities in employment.

Title VII expressly prohibits hiring and job assignment based, *inter alia,* on race or national origin, and we know of no employer who today openly conditions access to jobs on such bases. Nevertheless, the same results can be achieved—whether or not so intended—by the utilization of factors "neutral on their face" which are unfairly slanted against minority groups. It is a sad but inescapable fact that Negroes, Mexican-Americans, Puerto Ricans and other minority groups *as a class* have suffered educations inferior to those of whites *as a class.* This deficiency is reflected not only in the number of grades completed, but also in the fact that the *quality* of education afforded to minorities so often is inferior to that afforded to whites.[1]

[1] For a contemporary demonstration of the inequality between predominantly white and predominantly black schools in a large city, see Judge Wright's exhaustive analysis of the District of Columbia school system in *Hobson* v. *Hansen,* 269 F. Supp. 401 (D.D.C. 1967).

Title VII cannot completely eradicate the employment disadvantage suffered by employees who have received inadequate educations. Educational deficiencies of minority employees necessarily preclude their advancing to jobs which *require* educational skills they do not possess. An employer does not violate Title VII by denying advancement to an employee who lacks the ability to perform the job to which he aspires. The solution to this problem lies elsewhere; it will not be found in Title VII.[2]

But Title VII can, and should, be implemented to eradicate employment disadvantage which results from an employer's use of standards for advancement which are *greater* than those required to perform the jobs involved. In these circumstances, employees who are in fact qualified will, nevertheless, be barred. Since minority workers as a class are less likely to meet excessive or irrelevant requirements, on account of educational deficiencies, the effect is plainly discriminatory.[3]

The unfairness of utilizing excessive or irrelevant standards for job advancement is dramatically illustrated by the facts of the instant case. Historically, the employer assigned Negroes only to its "Labor" department. In 1966, apparently in response to passage of Title VII, the employer provided that these employees could now transfer to the higher paying, more attractive departments previously reserved for whites. In order to transfer, however, the employees would

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[2] In the steel industry, the problem is being attacked through an experimental program of in-plant education, designed to advance employees from illiteracy through high school equivalency, thereby enabling them to qualify for higher paying jobs. The program is jointly sponsored by the federal government, USWA and the major steel companies.

[3] Non-job-related testing is one form of excessive standard—probably the most common one—but it is by no means the only device which works this injustice. For example, an employer who does not test at all, but who requires a high school diploma for advancement to jobs which in fact do not require that degree of educational attainment, equally discriminates.

have to achieve "passing" scores on two "quickie" tests—the Wonderlic Personnel Test and the Bennett Mechanical AA test.[4] These tests are in the record, and warrant the Court's attention. Taking the Wonderlic test as an example, it is doubtful that even one of its fifty questions is relevant to some of the jobs to which Negroes might seek to transfer in respondent's plant. For example:

* * *

4. Answer by printing YES or NO. Does B. C. mean "before Christ"?

* * *

20. Suppose you arrange the following words so that they make a complete sentence. If it is a true statement, mark (T) in the brackets, if false, put an (F) in the brackets.

    moss A stone gathers rolling

* * *

22. Two of the following proverbs have similar meanings. Which ones are they?
    1. Straws show which way the wind blows.
    2. An empty sack can't stand straight.
    3. No doctor at all is better than three.
    4. All is not gold that glitters.
    5. Too many cooks spoil the broth.

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[4] The Company treated a score of 20 on the Wonderlic test as "passing" (Exhibit Volume, pp. 112b-113b). According to the publishers of the test, however, the passing score for *skilled mechanics* and *sub-foremen* is 18 and for other categories of industrial employees it is lower. E. F. Wonderlic, Wonderlic Personnel Test Manual, page 5 (E. F. Wonderlic Associates, Inc. 1966). Thus, the Company denied Negroes access to jobs considerably less challenging than that of a skilled mechanic unless they achieved scores higher than that which the publisher considers necessary to qualify as a skilled mechanic.

43. Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory? All good things are cheap, all bad things very dear. Goodness is simple; badness is manifold.

* * *

47. Two of the following proverbs have similar meanings. Which ones are they?

    1. Perfect valor is to do without witnesses what one would do before the world.
    2. Valor and boastfulness never buckle on the same sword.
    3. The better part of valor is discretion.
    4. True valor lies in the middle between cowardice and rashness.
    5. There is a time to wink as well as to see.

* * *

These questions *perhaps* might have utility on a law school aptitude exam. As a measure of ability to fill jobs in an industrial plant they are ludicrous. And as a barrier to Negro advancement they are vicious—the more so because employers are growing increasingly enamored of these kinds of tests, and Wonderlic is one of the most popular.

The court below has held that the use of this test does not violate Title VII, absent evidence that it was adopted *for the purpose of* discriminating. That holding, if not reversed, will cripple Title VII. Too often employers, whether for non-discriminatory reasons or for discriminatory reasons which could never be proved, elect to staff their plants with employees who are super-qualified. In such cases, the plaintiffs will be able to prove disastrous effects upon the job opportunities of minority employees, and lack of business necessity, but not improper motivation.

Petitioners have set forth solid legal grounds why the decision below should be reversed. No point would be served by our duplicating that showing. We merely wish to apprise the Court of what thirty-four years of representation in the metals industries has taught the Steelworkers: unless this Court strikes down non-job-related tests and standards, the unhappy plight of minority employees in American industry cannot end.[5]

Respectfully submitted,

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[5] In our motion for leave to file this brief, *supra*, we recount USWA's partial success in securing abolition of non-job-related tests through collective bargaining. While the collective bargaining process obviously affords hope for alleviating this problem, it can never be the total answer. Too many employees—numbering in the millions—are not represented by unions and thus have no mechanism, other than Title VII, for securing relief from these evils. And even collective bargaining can do the job only where the employer voluntarily agrees to the union's demands for abolition of non-job-related standards, or where the employees' bargaining strength is sufficient to exact such an agreement.